HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE C.V. NAGARJUNA REDDY

WRIT PETITION No.12582 OF 2007

Between:

M/s. Hemadri Cements Limited,
8-3-960/11, Srinagar Colony,
Hyderabad – 500 073,
Represented by its Director,
Mr.K. Gopi Prasad,
S/o. S.N. Kilaru,
Aged about 50 years

…Petitioners

AND

Appellate Authority for Industrial &
Financial Reconstruction, 10th Floor,
Jeevan Prakash Building, 25,
Kasturba Gandhi Marg, New Delhi
and three others

...Respondents

: O R D E R :

Counsel for the petitioner : Shri S. Ravi

Counsel for the respondents : None

September 6, 2007

Per G.S.SINGHVI, CJ

This is a petition for quashing orders dated 5.7.2005 and 18.12.2006 passed by the Appellate Authority for Industrial and Financial Reconstruction, New Delhi (for short, 'AAIFR') whereby the appeal and review preferred by the appellant against the order of Board for Industrial and Financial Reconstruction (for short, 'BIFR') were dismissed.

The petitioner is a company registered under the Companies Act, 1956. In 1998, the Board of Directors of the company made a reference to BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'the Act'). The same was registered as Case No.247/1998. After enquiry, BIFR passed order dated 26.12.2000 for winding up of the company. On appeal, AAIFR set aside the order for winding up and sanctioned the scheme framed for revival of the company. This is evinced from paragraphs 8 to 12 of the appellate order, which are extracted below:

8. The enclosed scheme is sanctioned with immediate effect.
9. The amount of Rs.2.50 crore in the no-lien account (alongwith accrued interest, if any, after payment of the bills of advertisement sent by this Authority) with IDBI shall be distributed immediately amongst the three FIs (IDBI, ICICI and IFCI) as part of payment of the OTS amounts in proportion to the OTS amount for each of them as shown in the enclosed sanctioned scheme.
10. On payment of the OTS amount to the FIs, they will issue "no dues" certificate and release the securities. BOB shall be providing working capital to HCL and, on release of securities by FIs, HCL will create first charge on its fixed assets in favour of BOB. Therefore, BOB shall work as Monitoring Agency (MA) to assist the BIFR in monitoring the implementation of the scheme.
11. The implementation of the scheme shall be monitored by BIFR with the assistance of BOB as Monitoring Agency (MA). BIFR shall be free to exercise all their powers under SICA without being constrained by the fact that the scheme has been sanctioned by this Authority.
12. The appeal is allowed as stated above. The impugned order is set

aside. Copy of this order be sent alongwith the sanctioned scheme to all concerned parties.

By taking cue from the observations contained in paragraph 11 of the appellate order, BIFR again considered the matter and passed order dated 21.7.2003 whereby it confirmed the earlier order of winding up under Section 20 (1) of the Act and sent the matter to this Court.

The petitioner challenged the aforementioned order by filing an appeal under Section 25 of the Act. The same was dismissed by AAIFR by recording brief order dated 5.7.2007, which reads as under:

"No one appears on behalf of the appellant. This appeal is directed against the order dated 29.7.2003 passed by the learned BIFR for winding up the appellant company. We do not find any reason to interfere with the impugned order. The appeal is dismissed."

The application filed by the petitioner for restoration of the appeal, which was registered as M.A.No.26 of 2005, was dismissed by AAIFR on 18.12.2006 with an observation that it does not have the power to review order dated 5.7.2005.

Notice issued to the respondents has been duly served, but no one has appeared on their behalf to contest the writ petition.

We have heard Shri S. Ravi, learned counsel for the petitioner, who relied on order dated 24.1.2006 passed by this Court in Writ Petition No.24606 of 2006 and argued that the appellate order is liable to be set aside because it is devoid of reasons and also because the petitioner did not get reasonable opportunity of hearing.

We have considered the submission of the learned counsel and are inclined to accept the same. In paragraphs 6 to 8 of the affidavit filed by him in support of the writ petition, Shri K. Gopi Prasad, Director of the company has averred as under:

6. The appeal was listed several times, but due to the absence of quorum in the AAIFR, hearing of the appeal was got postponed. The petitioner had no knowledge about the constitution of the AAIFR, and in the circumstances was unable to instruct its counsel to appear for the hearing on the said date.

Unfortunately, the said appeal was dismissed by AAIFR on 5.7.2005, for non-representation on the part of the petitioner. AAIFR noted as under:

> "No one appears on behalf of the appellant. This appeal is directed against the order dated 29.7.2003 passed by the learned BIFR for winding up the Appellant Company. We do not find any reason to interfere with the impugned order. The appeal is dismissed."

7. The petitioner filed a review application numbered as M.A.No.26 of 2005. Immediately thereafter, set out the circumstances in which the petitioner was prevented from making appearance on 5.7.2005. The petitioner pointed out that earlier appeal was listed several times, but due to the absence of quorum in the AAIFR, hearing of the appeal was got postponed. The petitioner had no knowledge about the constitution of the AAIFR, and in the circumstances was unable to instruct its counsel to appear for the hearing on the said date. The petitioner had pointed out that at least one opportunity ought to have been given before dismissing the appeal, especially since the Appellate Authority was not functioning for a long time. A true copy of the review application filed before the AAIFR is filed herewith as Annexure P-5 hereto. The said review application was dismissed by Appellate Authority by its order dated 18.12.2006. AAIFR noted that it was conscious of the duty to pass speaking orders and that speaking orders are given only when the appeal is argued by the appellant and respondent on merits. Accordingly, AAIFR noted that they had gone through the impugned order of BIFR and were satisfied with it and therefore AAIFR did not give reasons in its order dismissing the appeal for default. A true copy of the order passed by the AAIFR in M.A.No.26 of 2005 in Appeal No.371 of 2003 on 18.12.2006 is filed herewith as Annexure P-6 hereto. It is respectfully submitted that the order of AAIFR in M.A.No.26 of 2005 passed on 18.12.2006, as also the order in Appeal No.371 of 2003 passed on 5.7.2005 are both incorrect and unsustainable for the following reasons:

8. As can be seen from the impugned order of AAIFR passed in Appeal No.371 of 2003, the Appellate Authority did not confine its orders for dismissal for default. The Appellate Authority also recorded the findings on merits saying that it was satisfied with the order passed by BIFR that the Appellate Authority could not have done it by a mere perfunctory order. The petitioner had been making strident efforts to rehabilitate the company in terms of identifying an investor who had evinced interest to settle the debts of secured creditors by way of acquiring the debts and underlying securities by way of deed of assignment. In this direction, the investor had already entered into a one time settlement arrangement with IDBI (Stressed Assets Stabilisation Fund) and had already paid substantial amounts (Rs.200 lakhs) to IDBI. The OTS proposals given by the investor to other secured creditors

viz. IFCI and ICICI are at an advanced stage of finalization. Unless there was a complete application of mind on the part of the Appellate Authority, and the various aspects of the proposed rehabilitation were considered by the Appellate Authority, the Appellate Authority could not have come to the conclusion that the order of the BIFR was correct on merits. It is respectfully submitted that there ought to have been a proper adjudication of the statutory appeal by the Appellate Authority. Since the Appellate Authority was not functioning for a long length of time, and matters were getting repeatedly adjourned for want of quorum, the appellant could not make representation on 5.7.2005 when the impugned order was passed in appeal. It is worthy of mentioning that the petitioner being a sick company situated in the State of A.P. could not afford to send a representative for each hearing or engage a counsel to represent which was burdening the petitioner company needlessly. It was only for this reason that there was no representation on 5.7.2005. The appellant was diligent to file a review application before the AAIFR immediately thereafter and therefore there ought to have been an opportunity for hearing before the AAIFR.

The above reproduced averments have not been controverted. Therefore, it is reasonable to take the view that due to absence of coram of AAIFR, the appeal was adjourned on more than one occasion and, on that account, the petitioner could not arrange for its representation on the date of hearing i.e. 5.7.2005. However, without considering the factum of frequent adjournment of the appeal due to the reasons beyond the control of the petitioner, AAIFR dismissed the appeal by passing a hybrid order i.e. dismissing of appeal for want of prosecution and also on merits.

In Writ Petition No.24606 of 2006, this Court considered the legality of an order similar to the one impugned in this petition and quashed the same on the ground of non-application of mind by AAIFR.

In view of the above, the writ petition is allowed. Orders dated 5.7.2005 and 18.12.2006 passed by AAIFR are quashed with the direction that the appeal preferred by the petitioner against the order of BIFR be decided afresh in accordance with law after giving opportunity of hearing to the representative of the petitioner.

G.S. SINGHVI, CJ

September 6, 2007

C.V. NAGARJUNA REDDY, J

svs